Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

I. May a private third party who purchases a promissory note from the FDIC rely upon 12 U.S.C. § 1821(d)(14), which allows the FDIC, in its capacity as conservator or receiver of a failed bank, to commence suit on a contract within six years?

II. Whether the statute of limitations applicable to the FDIC when acting in its capacity as conservator or receiver, 12 U.S.C. § 1821(d)(14), may be transferred and assigned to private third parties who purchase notes from the FDIC?

III. Are statutes of limitation rights and privileges that may be transferred by creditors to their assignees or are statutes of limitations rights that are personal to debtors and defendants?

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OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

V.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner Lee Weatherly respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Supreme Court entered in the above-entitled proceeding on March 9, 1994.

OPINIONS BELOW

The opinion of the Texas Supreme Court has not yet been reported in the official reporter as of the date of this Petition for Writ of Certiorari, but may be found at *Federal Debt Management, Inc. v. Weatherly*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994). The opinion of the Texas Court of Appeals is reported at *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774 (Tex. App.—Dallas 1992).

JURISDICTION

The opinion of the Texas Supreme Court was delivered on March 9, 1994, and Petitioner's motion for rehearing was denied on April 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

12 U.S.C. § 1821(d)(14)

(14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

STATEMENT OF THE CASE

The issue presented in this case is whether a private third party who purchases a promissory note from the FDIC may rely upon 12 U.S.C. § 1821(d)(14), which allows the FDIC, in its capacity as conservator or receiver of a failed bank, to commence suit on a contract within six years.

Respondent Federal Debt Management, Inc. ("FDM") commenced this suit on April 15, 1991, claiming to be the owner and holder of three promissory notes executed by Petitioner Lee Weatherly. The three promissory notes were executed at various times in 1986 and matured in September and November 1986. The notes were all payable to Heritage National Bank. The FDIC acquired the Weatherly notes on September 25, 1986, when it was appointed receiver for the bank. On October 27, 1989, the FDIC sold the notes to FDM. At the time that FDM acquired the notes, each note had been in default approximately three years.

More than a year elapsed before FDM filed suit to collect on the three promissory notes, and at the time suit was filed, April 15, 1991, each of the notes had been in default for slightly more than four years. Weatherly answered with an affirmative defense based on the Texas four-year statute of limitations, TEX. CIV. PRAC. & REMEDIES CODE ANN. § 16.004(a)(3), and moved for summary judgment. In its response to Weatherly's motion for summary judgment, FDM asserted for the first time that as transferee of the notes from the FDIC, it was entitled to assert a six-year statute of limitations, 12 U.S.C. § 1821(d)(14). After considering Weatherly's Motion for Summary Judgment and FDM's response, the trial court granted a take nothing judgment in favor of Weatherly.

On appeal, Texas Court of Appeals for the Fifth Supreme Judicial District of Texas (at Dallas, Texas), affirmed the judgment

in favor of Petitioner, holding that FDM is not entitled to assert the provisions of 12 U.S.C. § 1821(d)(14) and that FDM's claims were therefore barred by the Texas four-year statute of limitation. The Texas Supreme Court granted Respondent's application for writ of error and consolidated the appeal with another case, *Jackson v. Thweatt*.[1] In its opinion, the Texas Supreme Court held "that section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC to recover on those purchased assets, and that it applies retroactively to claims in existence on August 9, 1989." It is from the decision in the consolidated appeal that Petitioner seeks review by writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues of Exceptional Importance.

This is a case of national importance. Since the rise of bank failures starting in the mid-1980's, the Federal Deposit Insurance Corporation ("FDIC") has come into possession of hundreds of thousands of promissory notes that were held by failed banks. In an effort to liquidate the assets it had acquired, the FDIC began packaging some of the notes in pools of several hundred notes each and marketing the pools to private third party investors, who hoped to gain a windfall at the expense of the FDIC and the United States taxpayers.[2] After purchasing the notes from the FDIC at a fraction of their value, the investors would then begin their attempts to collect on the notes from the original

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[1] *See, Thweatt v. Jackson*, 838 S.W.2d 725 (Tex. App.—Austin 1992), *aff'd* ___ S.W.2d ___, 37 Tex. Sup. Ct. J. 555 (March 9, 1994).

[2] A similar practice has been employed by the Resolution Trust Corporation to dispose of assets of failed savings and loans.

makers. In cases where demands were unsuccessful, the private third party purchasers would institute suit, usually in state court, to enforce their claims. Many of these suits were brought after the expiration of the applicable state statute of limitations period. When the defendants answered that the claims were limitations barred, the private party plaintiffs would argue that they were entitled to the benefits of 12 U.S.C. § 1821(d)(14), even though that section is, by its terms, expressly limited to the FDIC.

Over the past two years, numerous cases have worked their way through the lower courts, each with the issue raised in this case: whether private third parties are entitled to assert 12 U.S.C. § 1821(d)(14) to defeat defenses based on state statutes of limitations. Published cases which have addressed this issue include: *Mountain States Financial Resources Corp. v. Agrawal*, 777 F.Supp. 1550 (W.D. Okla. 1991); *Thweatt v. Jackson*, 838 S.W.2d 725 (Tex. App. — Austin 1992), *aff'd*, ___ S.W.2d ___, 37 Tex. Sup. Ct. J. 555 (March 9, 1994); *Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310 (Colo. App. 1992), *reversed*, 870 P.2d 1244 (Colo. 1994); *Fall v. Keasler*, 1991 WL 340182 (N.D. Cal. Dec. 18, 1991); *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774 (Tex. App. — Dallas 1992), *reversed*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994); *White v. Moriarty*, 19 Cal. Rptr. 2d 200, 204 (Cal. Ct. App. 1993); *Martin v. Pioneer Title Co.*, 1993 WL 381101 (Idaho 4th Dist. Ct. 1993); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993); *Central States Resources Corp. v. First Nat. Bank in Morrill*, 501 N.W.2d 271, 278 (Neb. 1993); *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993); *Jon Luce Builder, Inc. v. First Gibraltar Bank, F.S.B.*, 849 S.W.2d 451, 455 (Tex. App.--Austin 1993, writ denied); *Cadle Co. II v. Stamm*, 1994 WL 30317 (Fla. Dist. Ct. App., February 7, 1994); and *Investment Co. of the Southwest v. Reese*, ___ P.2d ___ (N.M. April 21, 1994).

With the exception of the Texas Court of Appeals in this case, and the Colorado Court of Appeals in *Tivoli* (both of which

were later reversed), the courts have held that private third parties may invoke section 1821(d)(14), notwithstanding the plain and unambiguous language of that section limiting its application to the FDIC. These cases have ignored well-established rules of statutory construction and have instead based their result on confused notions of public policy (relying on the *D'Oench, Duhme* doctrine) and the common law of assignments (that an assignee stands in the shoes of its assignor).

This is the first case to reach the United States Supreme Court in which this issue is presented. Although the majority of lower courts that have addressed this issue have ruled in favor of the third party purchasers, given the proliferation of suits by the third party purchasers, this is an issue that should be addressed by this Court. At the present time this issue is still unresolved in forty-two states and ten federal circuits and will continue to arise until dispositively addressed by this Court.

A. 12 U.S.C. § 1821(d)(14).

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, which clarified and expanded certain powers of the FDIC. Prior to FIRREA, actions brought by the FDIC were governed by the statute of limitations applicable to the United States government generally, 28 U.S.C. § 2415, which held that an action brought by the United States or an officer or agency thereof founded on any contract must be brought within six years after the right of action accrues.

Prior to FIRREA, two circuit court decisions restricted the time in which the FDIC could bring suit under section 2415. In *FDIC v. Petersen*, 770 F.2d 141 (10th Cir. 1985), the Tenth Circuit held that the cause of action on a note accrued when the

note matured in the hands of the original assignor, regardless of when the FDIC obtained the note. The effect of this decision was to allow the FDIC, which may have acquired some notes in various degrees of default, substantially less than the six years normally allowed the government to bring suit. In *FDIC v. Hinkson*, 848 F.2d 432, 433 (3rd Cir. 1988), the Third Circuit held that the FDIC was limited to bringing suits within the six-year period set forth in section 2415 and could not avail itself of the longer limitations period under state law.[3] The new statute of limitations in FIRREA drafted especially for the FDIC, 12 U.S.C. § 1821(d)(14), resolves the conflict between the Third and Tenth Circuits by providing that the six year period commences upon the appointment of the FDIC as conservator or receiver and allows the FDIC the benefit of the state statute of limitations, if the state statute is longer than six years.[4]

The Texas Supreme Court incorrectly concluded that section 1821(d)(14) creates a "right" in the FDIC to bring suit within six years. It therefore reasoned that since under the common law of assignments an assignee stands in the shoes of its assignor, a private third party who purchases assets from the FDIC is entitled to the same privileges and immunities as the FDIC. The

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[3] Contrary to *Petersen*, *Hinkson* holds that limitations under section 2415 does not commence to run against the FDIC until the FDIC acquires the note.

[4] Some courts have incorrectly reasoned that section 1821(d)(14) extends the period of time in which the FDIC may bring suit. However, without the restrictions imposed by either 28 U.S.C. § 2415 or 12 U.S.C. § 1821(d)(14), the FDIC would have an unlimited time to bring suit. *United States v. Summerlin*, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940); *FDIC v. Hinkson*, 848 F.2d 432, 433 (3rd Cir. 1988). Although section 1821(d)(14) operates in some instances to expand the time in which the FDIC may bring suit over section 2415, it nevertheless is a major restriction on the otherwise unlimited right of the sovereign to bring suit.

fundamental flaw in the Court's logic is its conclusion that section 1821(d)(14), which is clearly a statute of limitations, creates "a right transferable to subsequent purchasers." The title of the section identifies it as a statute of limitations applicable to the FDIC acting as conservator or receiver[5] and the plain language of the statute identifies the FDIC acting in its capacity as conservator or receiver as the only party governed by the section. Incredibly, the Texas Supreme Court states that its holding is consistent with the plain language of the statute:

> This reading does not contravene the plain language of the statute. Although section 1821(d)(14) does not expressly create a special limitations rule for transferees, it unquestionably does so for the FDIC. The FDIC, as possessor of this right, may transfer it incident to the asset to which the limitations period relates. Thus, while the statute alone might not vest any rights in transferees, the statute combined with the common law of assignment does. . . .

This "right" in the transferees of the FDIC is not created by FIRREA, the common law of assignments, or the combination of both—instead it is manufactured out of thin air by the Texas Supreme Court. The statute is silent as to any party other than the FDIC (in its capacity as conservator or receiver). The common law of assignments therefore does not support the assignment of rights, privileges, and immunities of the sovereign to private parties acting for their own benefit.

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[5] The caption of Section 1821(d)(14) reads: "Statute of Limitations for actions brought by conservator or receiver." This appears to be a reliable indication that Congress intended this section to operate as a statute of limitations instead of as a "right" that may be assigned or transferred.

B. Judicial Construction of Statutes of Limitation.

The primary purpose of statutes of limitation is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend. Statutes of limitation are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected if the right to sue thereon exists. Statutes of limitation are designed to prevent undue delay in bringing suit on claims and to suppress fraudulent and stale claims from being asserted, to the surprise of the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. 51 Am.Jur.2d *Limitation of Actions* § 17, p. 602 (1970). Statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965).[6] A judicial interpretation that allows private third parties to assert a state law claim founded on contract beyond the time allowed by a state statute of limitations only frustrates the reasonable commercial expectations of the parties involved.

Another problem arises when the state courts are unable to filter the stale suits through the use of state statutes of limitation. The elapse of an extended period of time makes it more complicated for the third party purchasers from the FDIC to prove

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[6] Quoting from *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788.

their case. For example, the holder of a note is under a burden to prove what amounts are due under the note and in many instances the only evidence available consists of hearsay bank records that were generated several years earlier. The lack of availability of witnesses to verify these records makes proof in these note cases substantially more difficult, thereby clogging already cluttered judicial dockets. The application of the state statute of limitations has the salutary effect of removing unnecessary clutter and stale claims from court dockets. As this Court has noted, "courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett*, 380 U.S. at 428, 85 S.Ct. at 1054.

II. The Decision of the Texas Supreme Court Conflicts With Decisions of the Third Circuit Court of Appeals and the United States Supreme Court.

The Texas Supreme Court erred in holding that statutes of limitation are rights that may be transferred between plaintiffs and that an assignee is entitled to the benefits of the same limitations period as its assignor. This holding is in direct conflict with the opinion of the Third Circuit Court of Appeals in *FDIC v. Hinkson*, 848 F.2d 432 (3rd Cir. 1988).

In *Hinkson*, a pre-FIRREA case, the FDIC brought suit on a note that it had received by assignment after the federal statute of limitations had lapsed but within the time allowed by state law. Under Delaware law, which would have applied had the suit been between private parties, a note under seal was governed by a twenty-year statute of limitations. The Third Circuit rejected the FDIC's argument that because of the assignment, it enjoyed the same rights any other assignee would have to bring suit within twenty years, holding that the FDIC was bound by the provisions

of section 2415 limiting it to six years to bring an action. The Third Circuit noted that prior to the enactment of section 2415, the FDIC would have had an unlimited time to bring suit, even more than the twenty years permitted by Delaware law. The opinion of the Texas Supreme Court in the present case is squarely in conflict with the Third Circuit's holding in *Hinkson* that an assignee is not governed by the same statue of limitations that applied to its assignor. Because the FDIC was bound in *Hinkson* to bring its contract claims within the six year period mandated by 28 U.S.C. § 2415 and was prohibited from asserting the longer state statute of limitations that applied to its predecessor in interest, it follows that an assignee of the FDIC (as in the present case) is bound to assert its claims within the period mandated by state law and not within the longer period mandated by 12 U.S.C. § 1821(d)(14), which is limited by its express terms to actions commenced by the FDIC.

In fact, statutes of limitation have never been treated as rights of plaintiffs—instead courts have uniformly held that statutes of limitation are personal to defendants and do not confer any right of action, but are enacted to restrict the period of time within which the right, otherwise unlimited,[7] might be asserted. 54 C.J.S. *Limitations of Actions*, § 3, pp. 17-18 (1977), *citing*, *American Nat. Ins. Co. v. Hicks*, 35 S.W.2d 128, 130 (Tex. Comm'n App. 1931, judgm't adopted). *See also*, 51 Am.Jur.2d *Limitation of Actions* § 20 (1970). The Texas Supreme Court incorrectly assumes that section 1821(d)(14) creates a right in the FDIC by giving it six years in which to bring suit. Without the restrictions imposed by either 28 U.S.C. § 2415 or 12 U.S.C. § 1821(d)(14), the FDIC would have an unlimited time to bring suit.

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[7] At common law, there was no fixed time for the bringing of actions. A cause of action, once matured, lasted forever. "Limitations are created by statute and derive their authority therefrom; they are legislative and not judicial acts." 54 C.J.S. *Limitations of Actions* § 2, p. 17 (1977).

United States v. Summerlin, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940); *FDIC v. Hinkson, supra*. The FDIC is an agency of the federal government. *Hinkson, supra*. Statutes of limitation do not run against the rights of the public. 54 C.J.S. *Limitations of Actions* § 16 (1977). Consequently, unless it is expressly provided by constitution or statute, statutes of limitation do not run against the federal government or an agency thereof. 54 C.J.S. *Limitations of Actions* § 17 (1977).

Section 1821(d)(14) is a limitation on the unlimited right of the United States government to bring suit on its claims and the government's immunity from the operation of state statutes of limitation. The immunity of the United States (or the FDIC) from the operation of statutes of limitation applies to a note or claim which is acquired by the United States (or the FDIC) through transfer or assignment even though the statute had commenced to run before the acquisition. *United States v. Dobbins*, 139 F.2d 169 (5th Cir. 1943). This sovereign immunity from application of statutes of limitation does not extend to assignees or transferees of the sovereign who seek to enforce rights purely for their private benefit. *Cressey v. Meyer*, 138 U.S. 525, 11 S.Ct. 387, 34 L.Ed. 1018 (1891); *Shumway v. State*, 163 P.2d 274 (Ariz. 1945); *Brookfield v. Rock Island Improvement Co.*, 169 S.W.2d 662, 665 (Ark. 1943); 54 C.J.S. *Limitations of Actions* § 20 (1977); 27 Am.Jur.2d *Equity* § 156.

In *Cressey v. Meyer*, William Cressey, an alien, commenced suit in a United States circuit court against the stockholders of a failed bank to recover payments due him under bonds issued by the state in connection with the capitalization of the bank. Cressey amended his suit to add the stockholders of the bank, seeking to charge these stockholders for the amounts they owed the state pursuant to an earlier settlement with the state. Subsequently the State of Louisiana intervened in the suit. After the trial court sustained the defenses of the stockholders, Cressey

appealed. The United States Supreme Court, on appeal, noted that the case was an action by a creditor of the state, "not against his debtor [the state], but against [the state's] debtors, to secure an appropriation of their debts to [the state] to the satisfaction of [the state's] obligations to him. It is a proceeding of a garnishee nature." 11 S.Ct. at 388. Cressey's suit was commenced some nineteen years after the last payment was due under the settlement between the stockholders and the state. Affirming the judgment of the trial court, the United States Supreme Court noted that although limitations and laches did not run against the sovereign, "that right is personal to the sovereign; it does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor, as against its debtors, does not give to such creditor its sovereign exemption from liability to the statute of limitation and the defense of laches." 11 S.Ct. at 388. *Cressey* demonstrates the fallacy behind the Texas Supreme Court's reliance on "the common law of assignments." Personal rights of the sovereign, such as immunity from the application of state statutes of limitation or the doctrine of laches, do not pass to assignees of the sovereign or to private parties attempting to enforce rights of the sovereign for their own benefit. Because private parties do not enjoy immunity from the bar of state statutes of limitation, and because private parties do not receive the sovereign's immunity simply through assignment of claims, then application of section 1821(d)(14) to suits brought by private parties runs contrary to the purposes behind the federal statute of limitation, which is not to extend the time for the sovereign to act, but to restrict it.

III. The Texas Supreme Court Has Incorrectly Decided An Important Question Of Federal Law Which Has Not, But Should Be, Settled By this Court.

A private third party who purchases a promissory note from the FDIC may not take advantage of 12 U.S.C. §

1821(d)(14), which allows only the FDIC, in its capacity as conservator or receiver of a failed bank, to commence suit on a contract within six years. The language of section 1821(d)(14) is clear and unambiguous. The six-year statute of limitations applies only to actions "brought by *[the FDIC]* as conservator or receiver." 12 U.S.C. § 1821(d)(14) (emphasis added). Assignees of the FDIC are not covered by the express and unambiguous terms of the statute.

A. Rules Of Statutory Construction.

The starting point in any case of statutory construction is the statute itself. *Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 602, 112 L.Ed.2d 608 (1991). Section 1821(d)(14) is expressly limited to actions brought by the FDIC as conservator or receiver:

> **(14) Statute of limitations for actions brought by conservator or receiver**
>
> **(A) In general**
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to *any action brought by the Corporation as conservator or receiver* shall be—
>
> **(i)** in the case of any contract claim, the longer of—
>
> **(I)** the 6-year period beginning on the date the claim accrues; or
>
> **(II)** the period applicable under State law; and
>
> **(ii)** in the case of any tort claim, the longer of—
>
> **(I)** the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

[Emphasis added]. The "Corporation" referred to in Section 1821(d)(14) is the Federal Deposit Insurance Corporation. *See*, 12 U.S.C. § 1811. Nowhere does Section 1821(d)(14) provide that assignees or transferees of assets held by the FDIC are entitled to assert the six-year period of limitations for contract claims. The conclusion that third-party assignees of the FDIC may assert section 1821(d)(14) can only be reached through convoluted reasoning that ignores the plain meaning of the statute. Where statutes are silent or have omitted to add a class or category, courts are not free to expand the scope of that statute through the guise of statutory construction. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68; *Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991); *Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 70 L.Ed. 566 (1926). Statutes of limitations are created by Congress and the state legislatures, not by the courts. Courts are not free to rewrite statutes enacted by Congress and, where the statute is unambiguous and Congressional intent is clear from the face of the statute, the plain language should be followed by the courts. The language of 12 U.S.C. § 1821(d)(14) is clear —the six year statute of limitations for contractual claim applies only in actions "brought by the [FDIC] as conservator or receiver." If Congress had intended a broader application of the six year statute of limitations, it could easily have drafted the statute to include purchasers of assets from the FDIC. It did not.

Courts are not at liberty to amend or repeal a statute under the guise of construction, nor is it within the judicial function of a court to supply omissions in a statute, even though that which was omitted may have been omitted by oversight or inadvertence. It is not for a court to extend the scope of a statute beyond the point where Congress indicated it would stop. *In re Shear*, 139

F.Supp. 217, 221 (N.D. Cal. 1956). In *Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 70 L.Ed. 566 (1926), Justice Brandeis rejected an argument attempting to expand a taxation statute based upon omissions in the statute:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Congress's intent to limit the applicability of 12 U.S.C. § 1821(d)(14) to the FDIC could not be any clearer; there is no room to expand that statute through judicial construction to include within its ambit private third parties.

B. While courts may have extended rights arising under common law to transferees of assets of the FDIC, courts have not extended rights arising under federal statutes to transferees from the FDIC.

In its opinion, the Texas Supreme Court analogizes its application of section 1821(d)(14) to those cases where the FDIC's rights under 12 U.S.C. § 1823(e) have been extended to subsequent purchasers.[8] The flaw in the Texas Supreme Court's analysis is its failure to distinguish between rights arising under federal common law and rights arising under federal statutory law.

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[8] The most commonly-used argument for extending Section 1821(d)(14) to assignees of the FDIC has been the analogy to cases that have extended the *D'Oench* and federal holder in due course doctrines to assignees of the FDIC. Several courts have stated that FIRREA evidences Congressional intent to extend rights of the FDIC to its assignees to the fullest extent permissible.

This argument is aided by sloppy opinions written by lower courts that either are ignorant of the development of this area of the law or are too pressed by time to accurately set the law forth. In order to demonstrate the flaw in the Texas Supreme Court's analogy, it is necessary to examine the growth of the *D'Oench* and federal holder in due course doctrines.

The *D'Oench* doctrine originated in the case *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). In *D'Oench*, the appellant had given a promissory note to a bank with the understanding that the note was only to enhance the assets of the bank and that the bank would never attempt to collect the note. The FDIC later acquired the note as collateral for a loan it made to the bank and brought suit to collect the note. In defense to the FDIC's suit, the maker, D'Oench, Duhme & Co., asserted its agreement with the bank that the note would never be enforced. The Supreme Court rejected D'Oench's argument and held that the secret agreement could not be a defense to the FDIC's suit because it would tend to deceive federal banking authorities who, given their responsibility to protect the fiscal stability of financial institutions, must be able to evaluate a given bank's true assets and commitments.

In 1950, Congress codified the *D'Oench* doctrine in 12 U.S.C. § 1823(e), a statute that originally applied only to the FDIC acting in its corporate capacity. *Bell & Murphy and Associates v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir. 1990). Prior to the enactment of FIRREA in 1989, the FDIC, when acting in its capacity as conservator or receiver, did not enjoy the protection of Section 1823(e). As a result, various courts expanded the common law *D'Oench* doctrine to protect the FDIC in its receivership capacity, holding that Section 1823(e) did not preempt expansion of the common law doctrine. *FDIC v. McClanahan*, 795 F.2d 512, 514, n. 1 (5th Cir. 1986); and *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989). Subsequently,

the common law *D'Oench* doctrine was even extended to the FSLIC (which never enjoyed the statutory protection of Section 1823(e) in any capacity). *See*, *FSLIC v. Kroenke*, 858 F.2d 1067 (5th Cir. 1988); *FSLIC v. Lafayette Investment Properties, Inc.*, 855 F.2d 196 (5th Cir. 1988); and *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988). Eventually, the common law *D'Oench* doctrine was extended to entities that acquired assets from the FDIC or the FSLIC. *Bell & Murphy and Associates*, *supra*; *Porras v. Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990).

In 1989, the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") extended the statutory protection to the FDIC in whatever capacity it acts (*see*, 12 U.S.C. § 1823(e)) and to bridge Banks (12 U.S.C. § 1821(n)(4)(I)). However, FIRREA did not extend the statutory protection of Section 1823(e) to third party purchasers of assets from the FDIC. Historically, it has been the common law *D'Oench* doctrine and the common law holder in due course doctrine that were extended to protect entities not otherwise entitled to statutory protection of Section 1823(e).[9]

The federal holder in due course doctrine is a common law extension of the *D'Oench,* doctrine and has similar, but not identical elements. The federal holder in due course doctrine originated in the Eleventh Circuit in *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982), and was eventually adopted by the Fifth Circuit in *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988).

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[9] Before FIRREA, the statutory protection applied to the FDIC in its corporate capacity only, but FIRREA expanded the scope of Section 1823(e) to include FDIC in its receivership or conservatorship capacities. FIRREA has also extended that statutory protection to bridge banks in Section 1821(n)(4)(I), which contains language that is virtually identical to Section 1823(e). If Congress had intended for FDIC's statutory rights to automatically flow to bridge banks, then Section 1821(n)(4)(I) would have been unnecessary.

The federal holder in due course doctrine evolved as a complement to the *D'Oench* doctrine because the FDIC typically does not enjoy holder in due course status under state law. *FDIC v. Wood*, 758 F.2d 156, 158 (6th Cir. 1985). Although the holder in due course doctrine has been codified as state law under the Uniform Commercial Code, there is no statutory federal holder in due course scheme. The practical effect of the federal holder in due course doctrine is that it dispenses with the exceptions to holder in due course status where the FDIC acquires the instrument as part of taking over an estate or as part of a bulk transaction. *See*, TEX. BUS. & COM. CODE ANN. § 3.302. Otherwise, the federal courts are attempting to fashion federal holder in due course protection along U.C.C. lines. *Sunbelt Savings, FSB Dallas, Texas v. Montross*, 923 F.2d 353, 356 (5th Cir. 1991) *rev'd on other grounds and remanded*, 944 F.2d 227 (5th Cir. 1991) (en banc). Extension of the common law federal holder in due course doctrine does not support the Texas Supreme Court's decision extending statutory rights beyond the ambit delineated by Congress.

Cases that extend the protection of Section 1823(e) to transferees of the FDIC should be read carefully, especially in light of the historical development of the *D'Oench* doctrine. In cases where the courts have extended Section 1823(e), the extension is coupled with the common law *D'Oench* doctrine, indicating that the courts either fail to grasp the distinction between statutory and common law rights or that they simply do not care since the outcome under either scheme is the same.

C. No Congressional Intent To Extend Rights To Assignees.

One of the clearest manifestations in FIRREA of Congressional intent to limit the application of section 1821(d)(14) to the FDIC is found at 12 U.S.C. § 1823(d)(3)(A), which expressly extends the "rights, privileges, and authorities of the

Corporation as receiver under sections 1821 and 1825(b)" to the FDIC when it is acting in its corporate capacity. Implicit in this section is Congress' recognition that section 1821(d)(14) does not by itself extend to entities other than those mentioned therein.[10]

A careful examination of the statutory scheme, including provisions of FIRREA relating to bridge banks, further reveals that Congress did not intend to extend rights that are unique to the FDIC to the FDIC's assignees. When Congress enacted FIRREA in 1989, it authorized the FDIC to transfer assets of insolvent banks to "bridge banks," which would assume certain assets and liabilities of an insolvent bank. Bridge banks are used as an alternative to straight liquidation of an insolvent bank by the FDIC. The statutory vehicle creating bridge banks is 12 U.S.C. § 1821(n), which allows the Comptroller of the Currency to charter national banks as bridge banks. Section 1821(n) allows bridge banks to assume the deposits and liabilities of banks that are in default from the FDIC. In addition to those privileges normally enjoyed by national banks, Section § 1821(n) expands the rights of bridge banks by endowing them with certain powers similar to those of the FDIC. For example, when the FDIC becomes a party to a suit, it is entitled to apply for a suspension of the action for either a 45 or 90 day period. 12 U.S.C. § 1821(d)(12). When a bridge bank becomes a party to a suit by virtue of its acquisition of any assets or liabilities of a bank in default, it may request a 45 day suspension of the action. 12 U.S.C. § 1821(n)(4)(I).

Although bridge banks share certain powers of the FDIC, those powers are not coextensive. For example, actions involving bridge banks do not arise under the laws of the United States and bridge banks may not normally remove cases to federal court. *Cf.*,

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[10] See also 12 U.S.C. § 1441a(b)(1)(B) which makes gives the Resolution Trust Corporation the same agency status as the FDIC when it is acting as a conservator or receiver of an insured depository institution.

12 U.S.C. § 1819(b). In fact, Congress has declared that bridge banks are not agencies, establishments, or instrumentalities of the United States. 12 U.S.C. § 1821(n)(6). There is no statutory provision granting bridge banks the power to avoid fraudulent transfers, although section 1821(d)(17) grants that power to the FDIC. And, significantly, there is no statute of limitations that expressly applies to actions brought by bridge banks. Congress contemplated the use of bridge banks as an alternative to FDIC liquidation of insolvent banks and gave bridge banks specific powers that are unique to the FDIC. In those instances where Congress did not give bridge banks rights similar to the FDIC, it is apparent that Congress did not intend for bridge banks to exercise those rights. *See Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991).

Congress also clearly contemplated the FDIC's use of the private sector in carrying out its duties of liquidating insolvent banks:

> (K) Utilization of private sector. In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, and brokerage services, if such services are available in the private sector and the Corporation determines utilization of such services is practicable, efficient, and cost effective.

12 U.S.C. § 1821(d)(2)(K). If Congress had intended for the private sector to enjoy the same privileges and projections as the FDIC, it easily could have added statutory provisions similar to

those relating to bridge banks. Because Congress did not enact legislation affecting the rights and projections of transferees of assets from the FDIC, as it did with bridge banks, it follows that Congress did not intend for the private sector assignees to have powers coextensive with the FDIC's statutory powers.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF TEXAS

No. D-3057

CORDUS JACKSON, JR., PETITIONER

v.

GARY THWEATT, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

-- consolidated with --

No. D-3437

FEDERAL DEBT MANAGEMENT, INC., PETITIONER

v.

LEE WEATHERLY, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court in which all JUSTICES join. JUSTICE ENOCH not sitting.

Under 12 U.S.C. § 1821(d)(14), the FDIC has six years to bring suit on delinquent notes acquired from a failed bank. The issue presented in these consolidated cases is whether purchasers of such notes from the FDIC obtain the benefit of this federal limitations period. Because we conclude that they do, we affirm the judgment of the court of appeals in *Jackson v. Thweatt*, 838 S.W.2d 725, and reverse the judgment of the court of appeals in *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774. Both causes are remanded to the trial court for further proceedings.

I

Jackson v. Thweatt

Cordus Jackson, Jr. executed a promissory note to the People's National Bank of Lampasas in January 1984, which he failed to pay when it became due on May 3, 1984. The Federal Deposit Insurance Corporation ("FDIC") became the owner and holder of the note on April 18, 1985, when it was appointed receiver for the bank. On December 28, 1988, the FDIC sold the note to Gary Thweatt.

Thweatt sued Jackson on the note on April 15, 1991. The trial court granted Jackson's subsequent motion for summary judgment based on the four-year limitations period set forth in Tex. Civ. Prac. & Rem. Code § 16.004. The court of appeals reversed, concluding that, because Thweatt acquired the note from the FDIC, the suit was governed by the six-year limitation period set forth in 12 U.S.C. § 1821(d)(14). 838 S.W.2d at 728. As this limitation period did not begin running until April 18, 1985, when the FDIC was appointed receiver, Thweatt's suit was held to be timely.

Federal Debt Management, Inc. v. Weatherly

Lee Weatherly defaulted on three promissory notes payable to Heritage National Bank maturing between September and November, 1986. The FDIC acquired the Weatherly notes on September 25, 1986, when it was appointed receiver for the bank. On October 27, 1989, it sold the notes to Federal Debt Management, Inc.[11] Federal Debt Management sued Weatherly on the notes on April 15, 1991. As in *Thweatt*, the trial court granted summary judgment for the defendant based on the Texas four-year statute of limitations. The court of appeals affirmed, concluding that the six-year limitations period under 12 U.S.C. § 1821(d)(14) did not apply to actions filed by assignees of the FDIC. 842 S.W.2d at 779.

The courts of appeals in *Thweatt* and *Weatherly* thus reached opposite conclusions on this important issue. We granted both applications for writ of error to resolve this conflict.

II

12 U.S.C. § 1821(d)(14) provides as follows:

(A) In general

> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation[12] as conservator or receiver shall be--

---

[11] Federal Debt Management is a Texas corporation engaged in the business of purchasing notes from the FDIC and the Resolution Trust Corporation.

[12] "Corporation" in this statute refers to the FDIC. 12 U.S.C. § 1811.

> (i) in the case of any contract claim, the longer of--
>
> (I) the 6-year period beginning on the date the claim accrues; or
> (II) the period applicable under State law. . . .
>
> (B) Determination of the date on which a claim accrues
>
> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of--
>
> (i) the date of appointment of the Corporation as conservator or receiver; or
> (ii) the date on which the cause of action accrues.

This provision was enacted in 1989 as part of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Pub. L. No. 101-73, § 212(d)(14), 103 Stat. 183, 232-33 (1989).[13]

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[13] Before 1989, claims brought by the FDIC were governed by 28 U.S.C. § 2415(a), the limitations period applicable to the federal government generally. That section provides in relevant part as follows:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof, which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . .

Jackson and Weatherly do not dispute that the collection suits against them would be timely if governed by section 1821(d)(14). They argue, however, that this provision applies only to actions brought by the FDIC, not to actions brought by the FDIC's successors in interest. Additionally, Jackson argues that section 1821(d)(14) does not apply retroactively to claims arising before FIRREA's enactment.

A

Section 1821(d)(14) expressly refers only to actions "brought by the [FDIC]."[14] The court of appeals in *Weatherly*, as

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26 U.S.C. § 2415(a). Courts construing this provision have split as to when the six year limitations period begins to run. *Compare, e.g., FDIC v. Hinkson*, 848 F.2d 432, 434-35 (3rd Cir. 1988)(limitations does not begin to run until the FDIC acquires the claim), *with FDIC v. Belli*, 981 F.2d 838, 840 (5th Cir. 1993)(limitations begins to run when the claim could have first been sued upon, even if the FDIC had not yet acquired the cause of action). FIRREA resolved this issue by providing that limitations begins to run, at the earliest, when the FDIC acquires the claim. § 1821(d)(14)(B). Also, FIRREA allows the FDIC to take advantage of state limitations if it is longer than six years, whereas courts construing section 2415(a) concluded that it completely superseded state limitations. *See, e.g., Hinkson*, 848 F.2d at 434.

[14] Although the language of the statute is actually limited to "actions brought by the [FDIC] as *conservator or receiver*," it is made expressly applicable to the FDIC in its corporate capacity pursuant to 12 U.S.C. § 1823(d)(3)(A), which provides:

> IN GENERAL.--With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title.

See FDIC v. Howse, 736 F.Supp. 1437, 1445 (S.D. Tex. 1990).

well as the dissent in *Thweatt*, concluded that the language of this statute is plain and, regardless of policy considerations, could not be construed as applying to actions brought by *assignees* of the FDIC. We conclude, however, that the FDIC's successors in interest are entitled to the benefits of section 1821(d)(14) pursuant to the common law maxim that "[a]n assignee stands in the shoes of his assignor." *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993); *see also* 6A C.J.S. Assignments, §§ 76-77 (1975).

The Uniform Commercial Code incorporates this rule with regard to promissory notes:

> (a) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

Tex. Bus. & Com. Code § 3.201(a) (Tex. UCC) (Vernon 1968). The policy underlying this rule "is to assure the holder in due course a free market for the paper." § 3.201 comment 3. This policy is particularly compelling with regard to notes acquired by the FDIC from an insolvent banking institution and sold to third parties pursuant to a purchase and assumption transaction. One of FIRREA's purposes was to "provide funds from public and private sources to deal expeditiously with failed depository institutions." Pub. L. No. 101-73, § 101(8). If the FDIC's statute of limitations did not enure to the benefit of its transferees, the market value of notes and other assets in the hands of the FDIC would be diminished, hindering this statutory purpose. As noted in *Fall v. Keasler*, 1991 WL 340182, at *4 (N.D. Cal. Dec. 18, 1991):

> To hold that assignees are relegated to the state

> statute of limitations would serve only to shrink the private market for the assets of failed banks. It would require the FDIC to hold onto and prosecute all notes for which the state statute of limitations has expired because such obligations would be worthless to anyone else. This runs contrary to the policy of allowing the FDIC to rid the federal system of failed bank assets. The FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC.

See also Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers From the FDIC*, 110 Banking L.J. 292 (1993) (concluding that FIRREA limitations should be extended to subsequent purchasers); James J. Boteler, Comment, *Protecting the American Taxpayers: Assigning the FDIC's Six Year Statute of Limitations to Third Party Purchasers*, 24 Tex. Tech L. Rev. 1169, 1200 (1993) (same).

Because of this strong policy rationale, and in accordance with the principle that an assignee receives the full rights of the assignor, most courts have interpreted section 1821(d)(14), as well as the predecessor limitations provision in 28 U.S.C. §2415(a), as extending to purchasers from the FDIC. *See Jon Luce Builder, Inc. v. First Gibraltar Bank, F.S.B.*, 849 S.W.2d 451, 455 (Tex. App.--Austin 1993, writ denied); *Pineda v. PMI Mortgage Ins. Co.*, 843 S.W.2d 660, 669 (Tex. App.--Corpus Christi 1992), *writ denied*, 851 S.W.2d 191 (Tex. 1993); *Bledsoe*, 989 F.2d at 810; *Fall v. Keasler*, 1991 WL 340182, at *2-3; *Mountain States Financial Resources v. Agrawal*, 777 F.Supp. 1550, 1552 (W.D. Okl. 1991), *White v. Moriarty*, 19 Cal. Rptr. 2d 200, 204 (Cal. Ct. App. 1993); *Martin v. Pioneer Title Co.*, 1993 WL 381101, at *2-3 (Idaho 4th Dist. Ct. 1993); *Cadle Co. II, Inc. v. Lewis*, 864

P.2d 718 (Kan. 1993); *Central States Resources Corp. v. First Nat. Bank in Morrill*, 501 N.W.2d 271, 278 (Neb. 1993). *But see Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310, 1313 (Colo. App. 1992).

This reading does not contravene the plain language of the statute. Although section 1821(d)(14) does not expressly create a special limitations rule for transferees, it unquestionably does so for the FDIC. The FDIC, as possessor of this right, may transfer it incident to the asset to which the limitations period relates. Thus, while the statute alone might not vest any rights in transferees, the statute combined with the common law of assignment does. As the Fifth Circuit noted in *Bledsoe*, "[a]s the statute at hand is silent as to the rights of assignees, we turn to the common law to fill the gap." 989 F.2d at 810.

An analogy may be drawn to the FDIC's special rights under 12 U.S.C. § 1823(e). This provision essentially codifies the holding of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), in which the Supreme Court ruled that unrecorded agreements that tend to mislead banking examiners cannot be raised as a defense against the FDIC. *See Kilpatrick v. Riddle*, 907 F.2d 1523, 1526 (5th Cir. 1990); *FDIC v. Newhart*, 892 F.2d 47, 49 (8th Cir. 1989); *see also* Peter G. Weinstock and Christopher T. Klimko, *Banking Law*, 45 Sw. L.J. 1, 12 (1991). Although section 1823(e) also expressly applies only to the FDIC, its protection has generally been extended to purchasers of assets from the FDIC. *See, e.g., Victor Hotel Corp. v. F.C.A. Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989); *Fleet Bank of Maine v. Steeves*, 785 F.Supp. 209, 213-15 (D. Me. 1992); *CMF Virginia Land, L.P. v. Brinson*, 806 F.Supp. 90, 93 (E.D. Va. 1992); *Alarcon v. Williams*, 772 F.Supp. 334, 342 (E.D. Mich. 1991); *B.L. Nelson and Assocs. v. Sunbelt Sav.*, 733 F.Supp. 1106, 1112 (N.D. Tex. 1990). This extension is likewise founded on the policy that, for assets to be marketable in the hands of the FDIC, its protections

must be available to purchasers. *See Newhart*, 892 F.2d at 49-50; *Brinson*, 806 F.Supp. at 93; *Alarcon*, 772 F.Supp. at 343-44.

Jackson and Weatherly would dismiss this analogy because section 1823(e) is merely a statutory parallel of the common law *D'Oench Duhme* doctrine. Courts are free to extend a common law right, they contend, but not one that arises by statute, such as limitations. If Congress had intended subsequent purchasers to benefit from section 1821(d)(14), the argument goes, Congress would have expressly said so.

The cases cited above, however, have extended not only the common law *D'Oench Duhme* doctrine, but its statutory counterpart as well. Further, the fact that the federal limitations rule arises purely by statute does not preclude courts from looking to federal common law in interpreting and applying that rule. Congress could have expressly made section 1821(d)(14) applicable to the FDIC's successors in interest, but one could just as easily argue that "Congress knew of the extensive body of case law extending the FDIC's benefits (like federal holder in due course, *D'Oench Duhme* and Section 1823(e)), and therefore thought it unnecessary to restate the federal common law." Woram, supra at 304. In *Bledsoe*, the court noted that

> [i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of common law.

989 F.2d at 810. Similarly, the Supreme Court has directed federal courts "to fill the interstices of federal legislation 'according to their own standards'" in areas affecting nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Federal banking law undoubtedly constitutes such a program. *See* Woram, supra at 308.

B

Jackson and Weatherly also argue that statutes of limitations do not confer a "right" transferrable to assignees. In *City of Dallas v. Etheridge*, 253 S.W.2d 640, 643 (Tex. 1953), we stated that "statutes of limitations do not affect the substantive rights of parties; they merely bar the remedy by which one party seeks to enforce his substantive rights." In the present case, however, the FDIC's successors in interest are not asserting the FIRREA limitations provisions to *avoid* an obligation, but rather to *enforce* obligations that would otherwise be barred under state law. In this context, FIRREA does create a right transferable to subsequent purchasers. *See* Woram, supra at 306, Boteler, supra at 1178.

Alternatively, Jackson and Weatherly contend that the FIRREA limitations provision is a right "personal" to the FDIC, and thus non-transferable according to the general rule as stated in Corpus Juris Secundum:

> Unless a contrary intention is manifest or inferable, an assignment ordinarily carries with it all rights, remedies, and benefits which are incidental to the thing assigned, *except those which are personal to the assignor and for his benefit only*.

6A C.J.S. Assignments, § 76 (1975) (emphasis added). Jackson and Weatherly basically argue that the FIRREA limitations provision is personal to the FDIC simply because it is the only party expressly named in the statute. An examination of the cases cited in Corpus Juris Secundum in support of the quoted rule, however, reveals that rights "personal" to the assignor are those which, although relating to the property assigned, constitute

accrued causes of action that may be asserted independently of ownership of the property. *See Briedecker v. General Chem. Co.*, 47 F.2d 52 (7th Cir. 1931) (conveyance of land held not to constitute an assignment of the grantor's cause of action for damages previously sustained for trespass upon the land conveyed); *Huston v. Ohio & Colorado Smelting & Ref. Co.*, 165 P. 251 (Colo. 1917) (assignment of stock held not to transfer assignor's cause of action for fraud in connection with the stock's purchase). The extended limitations period afforded by FIRREA, which confers no benefit independent of the asset to which it relates, does not fall into this category.

For the foregoing reasons, we conclude that, pursuant to federal common law, the limitations provision of 12 U.S.C. § 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC.

III

Jackson further argues that section 1821(d)(14) cannot apply retroactively to claims arising before FIRREA's enactment on August 9, 1989.

The statute contains no express provision dictating either prospective or retroactive application, and the legislative history on this issue is sparse and inconclusive.[15] The United States Supreme

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[15] Representative Solomon Ortiz commented as follows during floor debates:

> I seek to clarify the intent and effect of prospective application of the proposed bill. I understand this bill would redefine and augment the powers of the Federal Deposit Insurance Corporation when that Corporation serves as receiver for a failed financial institution. The powers set forth in this bill are, in many respects, new, and there is no intent that such powers be applied to receiverships that have

Court has provided conflicting guidance as to retroactive operation of a statute where the intent of Congress is not manifest. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), the Court stated that "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." Conversely, the Court stated in *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974), that

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been established prior to the enactment of this bill.

135 Cong. Rec. H5003 (daily ed. Aug 3, 1989). Henry B. Gonzalez, one of FIRREA's sponsors, stated that "as far as I know, there is no retroactive language in any part of the bill that would have any impact one way or the other on pending litigation." 135 Cong. Rec. H2748 (daily ed. June 15, 1989). Representative Ortiz, however, was not on a major committee overseeing FIRREA, and Representative Gonzalez's comment was in response to a specific question unrelated to limitations. *See* Jett Hanna, *Statute of Limitations Issues in FDIC and RTC Claims Against Attorneys Representing Failed Financial Institutions*, 12 Rev. Litig. 619, 640-41 (1993).

Senator Donald Riegle, referring specifically to the limitations provisions, commented that

> these limitations periods will significantly increase the amount of money that can be recovered by the Federal Government through litigation, and help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions. The provisions should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods.

135 Cong. Rec. S10,205 (daily ed. Aug. 4, 1989). This legislative history has been referred to as "fragmentary and contradictory." *Hanna*, supra at 640.

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Despite this tension,[16] it has generally been held that procedural rules apply retroactively. *See United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985); *Fust v. Arnar-Stone Labs, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984). In accordance with this principle, most courts have concluded that section 1821(d)(14) applies retroactively to causes of action in existence when the statute was passed in August 1989. *See FDIC v. Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991); *RTC v. Foley*, 829 F.Supp. 352, 353 (D.N.M. 1993); *RTC v. Greenwood*, 798 F.Supp. 1391, 1397 (D. Minn. 1992); *FDIC v. Schoenberger*, 781 F.Supp. 1155, 1158 (E.D. La. 1992); *FDIC v. Bancinsure, Inc.*, 770 F.Supp. 496, 499 (D. Minn. 1991); *RTC v. Krantz*, 757 F.Supp. 915, 922 (N.D. Ill. 1991); *FDIC v. Howse*, 736 F.Supp. 1437, 1446 (S.D. Tex. 1990); *Central States Resources Corp. v. First Nat. Bank in Morrill*, 501 N.W.2d 271, 277 (Neb. 1993). *But see FDIC v. Cherry, Bekaert & Holland*, 742 F.Supp. 612, 616 (M.D. Fla. 1990).

Retroactive application of section 1821(d)(14) is especially appropriate since it does not create an entirely new limitations scheme, but rather merely clarifies and amends the existing law under 28 U.S.C. § 2415(a).[17] *See Howse*, 736 F.Supp. at 1446;

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[16] The Supreme Court noted the "apparent tension" between *Bradley* and *Bowen* in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), but found it unnecessary to resolve the conflict in that case.

[17] As discussed at note 3, supra, section 1821(d)(14) expressly resolves the conflict under section 2415(a) concerning when the six year limitations period begins to run, and also grants the FDIC the benefit of the state statute of

Schoenberger, 781 F.Supp. at 1158. Retroactive application thus creates no manifest injustice. For these reasons, we agree with the majority of courts that have applied section 1821(d)(14) retroactively.

Jackson further argues that, even if section 1821(d)(14) is generally accorded retroactive application, its enactment cannot revive a claim already stale under state limitations. Jackson apparently contends as follows: the Texas four year statute of limitations commenced on May 3, 1984, when Jackson defaulted on his promissory note. Although this state limitations provision was superseded by 28 U.S.C. § 2415(a) while the note was held by the FDIC, it once again became applicable when Thweatt acquired the note on December 28, 1988. Recovery on the note was thus barred as soon as it was acquired by Thweatt, as this occurred more than four years after the original default. Because the claim was barred under state law when FIRREA was passed in 1989, it cannot be revived by that legislation, even assuming retroactive application.

Jackson correctly identifies the well-settled rule that a special federal limitations provision will not revive a claim already barred under state law. *See Belli*, 981 F.2d at 842; *FDIC v. Former Officers and Directors of Metropolitan Bank*, 884 F.2d 1304, 1309, n.4 (9th Cir. 1989); *Hinkson*, 848 F.2d at 434; *FDIC v. Consol. Mortgage and Fin. Corp.*, 805 F.2d 14, 17 n.4 (1st Cir. 1986). For example, if the FDIC is appointed receiver of a Texas bank five years after the default of an outstanding loan, suit is barred by the four-year Texas statute of limitations even though the federal limitations period is six years.

This rule does not apply here, however, as the claim against Jackson was not stale when the FDIC was appointed

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limitations if longer than six years.

receiver in 1985, less than a year after Jackson's default. The FDIC thus obtained the benefits of the six year limitation period under 28 U.S.C. § 2415(a), the forerunner of section 1821(d)(14). The claim in the hands of the FDIC was therefore *not* barred when FIRREA was passed in August 1989, as this was less than six years after the initial default. The FDIC thus would have obtained the retroactive benefits of FIRREA. Thweatt, as assignee, likewise succeeds to those rights.

To summarize, we hold that section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC to recover on those purchased assets, and that it applies retroactively to claims in existence on August 9, 1989. Section 1821(d)(14) thus governs the collection actions against Jackson and Weatherly. Because these actions were filed within six years after appointment of the FDIC as receiver, they were timely. The judgment of the court of appeals in *Jackson v. Thweatt*, is affirmed, and the judgment of the court of appeals in *Federal Debt Management, Inc. v. Weatherly*, is reversed. Both causes are remanded to the trial court for further proceedings.

/s/ Thomas R. Phillips
Thomas R. Phillips
Chief Justice

Opinion Delivered: March 9, 1994

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-01321-CV

FEDERAL DEBT MANAGEMENT, INC., Appellant

V.

LEE WEATHERLY, Appellee

On Appeal from County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. cc-91-3560-d

OPINION

Before Chief Justice Enoch and Justices Kaplan and Chadick[1]
Opinion By Justice Kaplan

This is a collection case. Federal Debt Management, Inc. (FDM) sued Lee Weatherly to collect all sums due and owing under three promissory notes. The trial court held that FDM's claims were barred by limitations. FDM appeals. We affirm.

[1] The Honorable T. C. Chadick, Justice, Supreme Court of Texas, Retired, sitting by assignment.

FACTS

Weatherly executed three promissory notes payable to Heritage National Bank. Note 1 was in the principal sum of $1,100 and matured on September 30, 1986. Note 2 was in the principal sum of $4,400 and matured on November 3, 1986. Note 3 was in the principal sum of $17,500 and matured on September 2, 1986. Weatherly defaulted in his obligation to make payments under the notes.

Heritage was declared insolent on September 25, 1986. The FDIC was appointed as receiver of the bank. The FDIC sold the promissory notes to FDM on October 27, 1989. FDM filed suit against Weatherly more than four years after the notes matured. Weatherly filed an answer and moved for summary judgment based on the four-year statute of limitations. The trial court entered summary judgment in favor of Weatherly. This appeal follows.

ISSUE ON APPEAL

The issue on appeal is whether FDM's claim is governed by the four-year statute of limitations under Texas law or the six-year statute of limitations applicable to the FDIC under federal law. FDM contends that assignees of the FDIC are entitled to the protections of the six-year statute under the Financial Institution's Reform, Recovery, and Enforcement Act of 1989 (FIRREA). 12 U.S.C. § 1821(d)(14) (1989). Weatherly argues that the benefits conferred by the federal statute do not extend to assignees of the FDIC and that the four-year limitations provision of the Texas Civil Practice and Remedies Code controls the disposition of this case. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986).

STATUTES OF LIMITATIONS

1. Generally

Statutes of limitations do not confer any right of action, but are enacted to restrict the period within which a right might be asserted. *American Nat'l Ins. Co. v. Hicks*, 35 S.W.2d 128, 130 (Tex. Comm'n App. 1931, judgm't adopted); *accord Salvaggio v. Houston Indep. Sch. Dist.*, 752 S.W.2d 189, 191-92 (Tex. App.--Houston [14th Dist.] 1988, writ denied). Statutes of limitations are remedial in nature. They do not constitute substantive law or create a right of action belonging to a particular party. *See Hicks*, 35 S.W.2d at 130. Rather, these statutes limit substantive rights "to compel the assertion of a cause of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available." *Matthew Constr. Co. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990). A statute of limitations is a shield of defense, not a spear of attack.

2. Statutory Construction

Courts are responsible for truly and fairly interpreting written law. *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920). We begin any statutory analysis by reviewing the statute. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). If the statute is clear and unambiguous, extrinsic aids and rules of statutory construction are inappropriate. *Ex parte Roloff*, 510 S.W.2d 913, 915 (Tex. 1974). We seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990). We must follow the clear language of the statute. *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985).

3. Federal Statute of Limitations

Section 1821(d)(14) of the United States Code creates a six-year statute of limitations for any action brought by the FDIC. The statute provides, in relevant part:

> (A) Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action *brought by the [FDIC]* as conservator or receiver shall be--
>
> (i) in the case of any contract claim, the longer of -
>
> (I) the 6-year period beginning on the date the claim accrues;
>
> (II) the period applicable under State law
>
> . . . .

12 U.S.C. § 1821(d)(14) (1989) (emphasis added).[2]

4. Texas Statute of Limitations

Section 16.004 of the Texas Civil Practice and Remedies Code creates a four-year statute of limitations for certain cases. The statute provides, in relevant part:

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[2] We note that section 1821(d)(14) was not enacted until August 9, 1989, as part of FIRREA, Pub. L. No. 101-73, § 212(d)(14), 103 Stat. 183, 232-33 (1989). However, courts have given the provision retroactive effect. *See FDIC v. Howse*, 737 F.Supp. 1437, 1445-46 (S.D. Tex. 1990).

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

. . .

(3) *debt.*

TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986) (emphasis added).

APPLICATION OF LAW TO THE FACTS

The language of section 1821(d)(14) is clear and unambiguous. The six-year statute of limitations applies only to actions "brought by *[the FDIC]* as conservator or receiver." 12 U.S.C. § 1821(d)(14) (emphasis added). Assignees of the FDIC are not covered by the express terms of the statute.

FDM contends that, notwithstanding the plain language of section 1821, actions brought by assignees of the FDIC should be governed by the six-year statute of limitations. FDM argues that: (1) federal common law supports the extension of the six-year statute of limitations to assignees of the FDIC; (2) the federal holder in due course doctrine and Texas UCC require the application of the six-year statute of limitations in this case; and (3) public policy dictates expanding the scope of the statute to include assignees of the FDIC. We reject these contentions.

1. Federal Common Law

FDM contends that the development of federal common law supports the extension of the six-year statute of limitations to assignees of the FDIC. FDM relies on cases that extend the

common law *D'Oench, Duhme*[3] doctrine. We agree that courts may expand common law principles to further sound public policy. However, the limitations provisions involved in this case are codified in a statute. We must interpret the statute as written and seek the intent of Congress as found in the plain and common meaning of the words and terms used. *Moreno*, 787 S.W.2d at 352; *Interkal*, 691 S.W.2d at 607.

Several federal district courts and the fifth circuit court of appeals have declined to expand the scope of FIRREA to cover entities other than those expressly named in the statute. *See Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990); *see also Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir.), *cert. denied*, 111 S. Ct. 954 (1990); *Adams v. Madison Realty & Dev. Inc.*, 746 F.Supp. 419, 431 (D.N.J.), *aff'd*, 937 F.2d 845 (3d Cir. 1990); *Morgan v. Heights Sav. Ass'n*, 741 F.Supp. 620, 622 (E.D. Tex. 1990); *but see B. L. Nelson & Assoc. v. Sunbelt Sav.*, 733 F.Supp. 1106, 1112 (N.D. Tex. 1990) (extending both statute and common law doctrine). Rather, these cases rely on the common law *D'Oench, Duhme* doctrine to protect the rights of assignees. Federal common law principles cannot be used to expand the protections afforded to the FDIC under section 1821(d)(14).

2. Federal Holder in Due Course and Texas UCC

FDM next contends that the federal holder in due course doctrine and Texas UCC support the extension of the six-year statute of limitations in this case.

a. Federal Holder in Due Course Doctrine

The federal holder in due course doctrine prevents the

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[3] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

maker of a promissory note from asserting personal claims as defenses or set-offs to the detriment of a bank's other creditors or depositors.[4] *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990). Under Texas law, however, a holder in due course is still subject to a valid limitations defense. *Cooper v. Hampton*, 123 S.W.2d 941, 942 (Tex. Civ. App.--Amarillo 1938, writ dism'd).[5] FDM has asserted a state, rather than a federal, cause of action against Weatherly. Since a statute of limitations is procedural in nature, Texas law applies unless expressly preempted. *See Morton v. Texas Welding & Mfg. Co.*, 408 F.Supp. 7, 9 (S.D. Tex. 1976). No such preemption exists under federal law for assignees of the FDIC.[6]

b. Texas UCC

Section 3.201(a) of the Texas Business and Commerce

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[4] The federal holder in due course doctrine and the *D'Oench, Duhme* doctrine are closely related. *Porras*, 903 F.2d at 381. Although there are differences between the two concepts, both enhance the ability to protect assets of failed institutions. The reasoning used by the courts in discussing one of the doctrines generally applies to the other. *Id.* The federal *D'Oench, Duhme* type defenses allow regulators to rely on the face value of bank records in valuing assets. These common law defenses are unique to federal corporate entities such as the FDIC, which insure deposits in financial institutions. *See Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 68 (Tex. 1992).

[5] We recognize that *Cooper* was decided before the Uniform Commercial Code was adopted in Texas. However, the parties to this appeal do not contend that a successor to the rights of a holder in due course is free from an otherwise valid limitations defense. The holding in *Cooper* thus remains unchanged by the Code.

[6] FDM's federal holder in due course argument begs the question. The issue remains whether the claim against Weatherly is governed by the four-year statute of limitations under Texas law or the six-year statute applicable to the FDIC under federal law.

Code provides, in pertinent part, that "transfer of an instrument vests in the transferee such *rights* as a transferor has therein." TEX. BUS. & COM. CODE ANN. § 3.201(a) (Vernon 1968) (emphasis added). FDM argues that, as an assignee, it stepped into the shoes of the FDIC and acquired its "rights" in the six-year statute of limitations.

The statute of limitations governing a particular cause of action is not a "right" inherited by an assignee. Rather, a statute of limitations is remedial in nature and limits substantive rights to compel the assertion of a cause of action within a specified period of time. *Rosen*, 769 S.W.2d at 694. FDM cannot step into the shoes of the FDIC for the purpose of asserting a procedural defense applicable only to the FDIC in its capacity as conservator or receiver.

3. Public Policy

FDM argues that the extension of the six-year statute of limitations to assignees of the FDIC plays a vital role in the scheme of resolving the affairs of insolvent financial institutions. This public policy argument is founded on the need to facilitate the private takeover of failed banks in order to lessen the burden on the FDIC insurance fund. We agree with FDM's interpretation of the legislative purpose of FIRREA. However, we cannot rewrite an otherwise clear and unambiguous statute under the guise of public policy. We must interpret the statute as written by Congress. *Interkal*, 691 S.W.2d at 607.

4. Other Cases

FDM relies on two Texas cases and one federal district court opinion that expand the limitations provisions of section 1821(d)(14) to include assignees of the FDIC. In *Thweatt v. Jackson*, No. 03-91-364-CV (Tex. App.--Austin August 26, 1992, n.w.h.) (op. on reh'g) (not yet reported), the Austin court of

appeals extended the six-year statute of limitations to the purchaser of a promissory note. The court justified extending the protections of section 1821 to the assignee under the holder in due course doctrine and for public policy reasons. *Thweatt*, slip op. at 5, *citing Porras*, 903 F.2d at 381.[7]

We reject the Austin court's interpretation of section 1821(d)(14) for the reasons previously set forth in our opinion. Instead, we reiterate the sound principles underlying the separation of powers doctrine expressed by Justice Powers in his dissenting opinion:

> Statutory language means something. If the statute is insufficient in terms of policy, it is the privilege of *Congress* to amend it. It is not a court's prerogative to add to an unambiguous statute a subject and class of persons not included therein, merely to effectuate the *court's* idea of what would be a wise and expedient addition. [Citation omitted.] A *court* may not assume Congress was ignorant of the relevant public policy when that body composed the statute in unambiguous terms to work in harmony with a general and complicated scheme intended to implement that very policy through the FDIC as receiver. A *court* may not assume it is wiser, better informed, or more able to formulate and implement the public policy in question. Congress having made *its* choices about implementing *its* decisions regarding the policy, it only remains for the court to enforce the will of Congress expressed in clear and unambiguous terms.

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[7] *Porras* does not support the court's extension of section 1821 to assignees of the FDIC. Rather, the *Porras* case involved the extension of the common law *D'Oench, Duhme* doctrine.

Thweatt, slip op. at 5 (Powers, J., dissenting) (emphasis in original).

In *Pineda v. PMI Mortgage Insurance Co.*, No. 13-91-239-CV (Tex. App.--Corpus Christi May 28, 1992, n.w.h.) (not yet reported), the court extended the six-year statute of limitations to assignees of federal agencies because the assignee acquired the "right" to use the limitations provision in the statute. *Pineda*, slip op. at 18. The court also held that the Texas four-year statute of limitations is tolled for all purposes when a federal agency acquires a note. *Pineda*, slip op. at 18, *citing United States v. Sellers*, 487 F.2d 1268 (5th Cir. 1973). We have rejected the argument that the statute of limitations confers a "right" that can be passed along to assignees. In addition, the holding in *Sellers* tolls the statute of limitations against the government at the time the government acquires a claim. *Sellers*, 487 F.2d at 1268. *Sellers* does not address claims asserted by assignees of governmental agencies or regulatory bodies. We reject the argument that the Texas four-year statute of limitations is somehow tolled and ceases to run against an assignee of the FDIC.

Finally, FDM cites *Mountain States Financial Resources Corp. v. Agrawal*, 777 F.Supp. 1550 (W.D. Okla. 1991), in support of its position. Like *Thweatt* and *Pineda*, the court in *Agrawal* extended the limitations provisions of section 1821(d)(14) based on the common law principle that "an assignee stands in the shoes of an assignor, and acquires all of the assignor's rights and liabilities in the assignment." *Agrawal*, 777 F.Supp. at 1552. We have held that the statute of limitations governing a particular cause of action is not a "right" inherited by an assignee. We do not find *Agrawal* persuasive.

CONCLUSION

We conclude that FDM's claims against Weatherly are controlled by the four-year statute of limitations set forth in section

16.004 of the Texas Civil Practice and Remedies Code. FDM is not entitled to the protections afforded to the FDIC under section 1821(d)(14). The record affirmatively shows that FDM did not file suit within four years after the cause of action accrued. FDM's claims are barred by limitations.

We overrule FDM's point of error. The judgment is affirmed.

/s/ Jeff Kaplan
JEFF KAPLAN
JUSTICE

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RE: Case No. D-3437

Style: FEDERAL DEBT MANAGEMENT, INC.
v. LEE WEATHERLY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Justice Enoch not sitting.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin
Blanca Morin, Deputy